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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

AMBROSE OLDLAND, CARRIE KNOWLES, ERNEST OLDLAND, GERALD OLDLAND, WALTER OLDLAND, CECILIA H. YOUNG, as sole Heir at Law of Leonard J. Young and as sole Legatee and Devisee under the last will and testament of said Leonard J. Young, deceased, THOMAS A. YOUNG, MABEL McGLINN DAIGNAULT, MARGARET McGLINN, ESTELLE CONNER WAIT, HENRY W. CONNER, RUTH CONNER WILLS, LEONARD McGLINN, IRVING A. WYNN, CARLYLE WYNN, JR., CARLYLE WYNN, SR., MARION P. McGLINN, a minor appearing by her next friend, Ernest Oldland, WILLIS SAXE MONTGOMERY III, MARCELLE MONTGOMERY ELLIS, E. C. PARSONS, M. K. ANDREW, WILLIAM K. PARSONS, ELIZABETH G. CARNEY, THOMAS F. CARNEY, MARIE LOUISE CROCKETT, WILLIAM CHARLES CARNEY, BETTY CARNEY, also known as Elizabeth Carney, and ERNESTINE CARNEY, minors, appearing by their next friend, Elizabeth G. Carney, HARRIETT ROSE KIMBALL, JOHN WATSON CARD, as Executor and Devisee under the last will and testament of Maggie Moog, Deceased, BENNETT C. SHIDELER, ELIZABETH R. WELTON, CORDELIA C. MILLER, OLIVE O. JOHNSTON, LILLIAN STEVENSON, CHARLES W. BANTA, ANNA REES, AVIS NEAL ROEMER, JOE TRACHTA, JOE JUHAN, CHARLES J. PEARSALL, HATTIE P. JOCELYN, CLIFFORD R. PEARSALL, RICHARD PEARSALL, ALICE P. HEINDEL, MARY PEARSALL, RAYMOND PEARSALL, CLAIRE P. PLATTER, FRANCIS M. SHIDELER, BYRON H. SHIDELER, JOHN CHESTER SMITH, an infant, by his next friend, Joseph J. Shideler, ELEANOR HASKINS, ROBERT W. SHIDELER, WALTER W. SHIDELER, EDWARD T. WILLIAMS, THOMAS EDWARD WILLIAMS, an infant, by his next friend, Joseph J. Shideler, and JOSEPH J. SHIDELER,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY,

Respondent.

FRANK DELANEY,
L. H. LARWILL,
Counsel for Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals

for the Tenth Circuit, entered in the above entitled case on March 10th, 1951.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals on second appeal, entered March 10th, 1951, is not yet reported. It is printed in the record (R. 33-39). The case was before said Court of Appeals on a prior appeal and is reported in 179 Fed. (2d) 408.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10th, 1951 (R. 40-41). A petition for rehearing filed on March 29th, 1951, (R. 48) was denied on April 5th, 1951, (R. 49). The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1).

III.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the decision of the United States Court of Appeals for the Tenth Circuit, on the second appeal, violates the doctrine of the law of the case, and in so doing conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Chicago, St. Paul, M. & O. R. Company vs. Culp,* 102 Fed. (2d) 352, 133 A.L.R. 1445 (certiorari denied 307 U. S. 636, 83 L. Ed. 1518, 59 S. Ct. 1032), and with the decision of the Supreme Court of the State of Colorado, in *Ginsberg vs. Bennett,* 106 Colo. 285, 104 Pac. (2d) 142.

2. Whether the decision of the United States Court of Appeals for the Tenth Circuit, on the second appeal, is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit, in the case of *Emerson vs. Little Sox Oil Company,* 3 Fed. (2d) 265, in that the

royalty interest, if any, now awarded the petitioners in this case is a fluctuating, uncertain portion of the lessees' interest in the oil produced with none of the elements of certainty necessary to constitute an interest in real estate; whereas, the United States Court of Appeals for the Fifth Circuit holds that an overriding royalty is an interest in land and is a part of the land. If part of the land, necessarily such interest is fixed and certain.

3. Whether the United States Court of Appeals for the Tenth Circuit so far departed from the accepted and usual course of judicial procedure as to call for the exercise of the power of supervision of this Court, and in particular:

(a) Did said Court follow and apply the law of the case as established in its first decision?

(b) Did said Court disregard the provisions of the assignment which was the basis of the trust relationship found to exist, and, by an unjustifiable extension of equitable discretion, allow the original trustee's assignee, with notice, to benefit by a breach of contract and a violation of duty contrary to decisions of this Court and of the Supreme Court of the State of Colorado?

4. Whether said Court decided an important question of local law; namely, the nature of overriding royalty and the manner of computing the same, in a way contrary to the weight of authority, and probably in conflict with decisions of the Supreme Court of the State of Colorado.

5. Did the United States District Court for the District of Colorado acquire jurisdiction by reason of the removal of this case from the State Court? The subsidiary question is whether there was a separable controversy with the requisite diversity of citizenship.

IV.

STATUTE INVOLVED

The pertinent statutory provision bearing on the jurisdictional question discussed under Reasons for Granting Writ of Certiorari is 28 U. S. C., Section 71, which was in force at the time of the removal of the case commenced by petitioners from the State Court to the Federal Court.

V.

STATEMENT

A petition for writ of certiorari to review the first decision of the United States Court of Appeals for the Tenth Circuit, reported as *Gray et al. vs. Oldland et al.,* 179 Fed. (2d) 408, was filed by the respondents herein and others. Certiorari was denied May 1st, 1950. See *Gray et al. vs. Oldland et al.,* 339 U. S. 948, 70 S. Ct. 803.

To understand the questions now presented, it is necesarry to refer to the record on the first appeal, which record will be referred to as "Orig. R.," as well as to the record on the second appeal to the United States Court of Appeals for the Tenth Circuit, which record will be referred to as "R." followed by the appropriate page number.

Both records have been certified, as provided by Rule 38(7) of this court. Both proceedings, insofar as material to a consideration of the questions now presented, are properly before this court. See *Panama R. Company vs. Napier Shipping Company,* 166 U. S. 280, 17 S. Ct. 572; *City of Indianapolis vs. Chase National Bank of the City of New York,* 314 U. S. 63, 62 S. Ct. 15.

This case was commenced by filing a complaint in the District Court of the State of Colorado in and for the County of Rio Blanco, to impress a trust on a lease from the United States of America to Nellie Ione Gray and Evlyn Levison, which lease had been assigned to Phillips Petroleum Company by the lessees, with the reservation of a royalty interest by Levison and Gray (Orig. R. 3-16).

The case was removed from said State Court on the ground of diversity of citizenship (Orig. R. 20-22 and 27). Motion to remand was made in the United States Federal District Court (Orig. R. 27-30). The motion was denied (Orig. R. 30). The proceedings on first appeal reported in *Gray et al. vs. Oldland et al.,* 179 Fed. (2d) 408, followed.

After denial of the petition for writ of certiorari, the case was remanded to the District Court of the United States for the District of Colorado (Orig. R. 622). The judgment of the United States Court of Appeals, following the first appeal, provided, "that this cause be and the same is hereby remanded to said District Court for further proceedings in conformity to the opinion expressed in the opinion of the Court" (Orig. R. 622). The District Court entered judgment (R. 16-20) for four per cent (4%) of the oil and seven and one-half per cent (7½%) of the *gas from gross production under the lease.* The second appeal by respondents followed. The opinion on this appeal reversed the judgment of the District Court (R. 33-39).

The court, in its judgment, directed, "that this cause be and the same is hereby remanded to the said District Court with directions to award the appellees four per cent of the oil and seven and one-half per cent of the gas produced and sold from the leasehold estate, *after the deduction of the statutory government royalty*" (R. 40-41). (Italics are ours.)

VI.

REASONS FOR GRANTING THE WRIT

1. The decision on the first appeal reported as *Gray et al. vs. Oldland et al.,* 179 Fed. (2d) 408 (Orig. R. 611-622), ~~under~~ the language printed as Appendix B, *infra,* Page 14, which we deem material in the determination of the question here presented.

When effect is given to all parts of the opinion on the first appeal, it will appear that the court awarded the petitioners a royalty of four per cent (4%) of the oil and seven and one-half per cent (7½%) of the gas produced,

based on gross production under the lease assigned to and held by respondent. This conclusion is fortified, if not made conclusive, by the interpretation placed on said opinion in the petition for rehearing filed by respondent, and others. A part of paragraph 11 of said petition (Orig. R. 630), on which the above statement is based, is printed as Appendix C, *infra,* Page 15.

In the opinion on the second appeal, the Court said:

> "In retrospect, however, we perceive how the learned trial court was led to construe our phraseology as it did, indeed, how all of the parties were at one time so misled. The use of the words 'in addition to the royalty due the government' in the original assignment to McLaughlin undoubtedly obligated him to pay the Oldlands the stipulated percentage of the value of all the oil produced and saved from the permit area. And, we have said that the rights of the parties under this agreement were 'preserved in all their vitality in the leases on which oil was ultimately obtained by Phillips'." (R. 34-35)

The decision had become the law of the case and was binding on the court, which rendered it on subsequent appeals under the doctrine announced in *Chicago, St. Paul, M. & O. R. Company vs. Culp,* 102 Fed. (2d) 352, 133 A.L.R. 1445. (Certiorari denied 307 U. S. 636, 59 S. Ct. 1032, 83 L. Ed. 1518.) In that case the court said:

> "While this rule of practice is not a limit of power, it is nevertheless a salutary one, and should be departed from only after careful consideration on situations arising in specific cases."

The decision we are seeking to have reviewed, and the decision just cited, are in conflict on a principle material to a proper decision of this case.

2. In the assignment dated March 15th, 1926, (Orig. R. 13-16), the basis of the rights claimed by petitioners herein, a copy of which is printed as Appendix A, *infra,* Pages 11-14, the terms "overriding royalty," "working

interest," and "leasehold estate" were not used. Because said terms were used in the first opinion, 179 Fed. (2d) 408, the United States Court of Appeals, concludes, in its second opinion, that petitioners were only entitled to four per cent (4%) of that part of the oil which remains after deduction of the percentage of oil payable to the United States as royalty. But the assignment contemplated a fixed percentage on total production. The right awarded petitioners as limited by the court in its opinion on the second appeal fluctuates and varies from day to day, month to month, and year to year. This fluctuation is not due to an increase or decrease in total production but to a variation in the rate of the United States' royalty, depending, according to the terms of the lease (Orig. R. 461 and 485), upon how much oil is produced under the management of lessees from each well. Because of the uncertain and variable elements mentioned above, petitioners' right, as fixed by the second decision, to a share in the production has none of the certain features of an interest in real proprety. However, in the case of *Emerson vs. Little Sox Oil Company,* 3 Fed. (2d) 265 (certiorari denied, 268 U. S. 700, 45 S. Ct. 636), the Fifth Circuit Court of Appeals held that overriding royalty is an interest in real estate. In principle, the two decisions are in conflict because a right to participate in the profits of a working interest is not real estate. *Mills-Willingham Law of Oil and Gas,* Page 185, Section 128; *Consolidated Arizona Smelter vs. Hinchman,* 212 Fed. 813.

The Emerson case is supported by the great weight of authority. Unless the instrument of conveyance otherwise provides, royalty and overriding royalty are universally based upon gross production. *Homestake Exploration Company vs. Schoregge,* 81 Mont. 604, 264 Pac. 388; *Mills-Willingham Law of Oil and Gas,* Section 128, Page 185; *2 Thornton on Oil and Gas* (5th Ed.), Section 363, Page 645; *3 Summers on Oil and Gas,* Section 554, Pages 317-319.

3. The decision on the second appeal in the United States Circuit Court of Appeals is unusual. It departs

from the accepted and usual course of judicial procedure in the following respects:

(a) For the reasons mentioned above, the decision departs from the established principle referred to as the law of the case.

(b) It invokes, in order to explain inconsistencies between the language used in the first opinion and the conclusion reached in the second opinion, an application of the principle of equitable discretion. Equitable discretion is closely related to and limited by judicial power.

In *Osborn et al. vs. The Bank of the United States,* 9 Wheaton 740 at 866, 22 L. Ed. 204 at 234, the Court said:

> "Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in the course prescribed by law; and when that is discerned it is the duty of the court to follow it."

It is submitted that two observations are important in this connection. Certainly equitable discretion is not ordinarily appropriate to excuse a trustee from compliance with his trust obligation, *(United States vs. Dunn,* 268 U. S. 121 at 132, 45 S. Ct. 451; *Bowes vs. Cannon,* 50 Colo. 262, 116 Pac. 330) nor is the equitable power properly invoked to excuse breach of contract generally. *(Rogers vs. Bruce,* 69 Colo. 298 at 300, 193 Pac. 1076; *Toll vs. McKenzie,* 88 Colo. 582 at 589; 299 Pac. 14.)

4. There is another consideration that impels the petitioners to ask for a review of the last decision of the United States Court of Appeals; namely, the importance to the oil industry of an authoritative decision as to the manner of computing overriding royalty. We urge that the meaning adopted in the opinion sought to be reviewed is contrary to the views of the text writers, and the decisions wherein that question has been considered in connec-

tion with instruments which grant overriding royalty expressed in percentage terms. In practically all of the decisions and by the text writers cited above, it is said that overriding royalty is calculated on gross production. The difference in dollars and cents in the two methods of computation amounted to Thirty-nine Thousand Two Hundred Dollars ($39,200.00) at the time judgment was entered on June 23rd, 1950 (R. 16-22). It is a safe assumption that the ultimate amount involved will be at least five (5) times that much.

5. The unexpected construction given by the United States Court of Appeals on the second appeal to the opinion and mandate rendered on the first appeal by which the nature and the monetary value of the petitioners' rights were radically altered to petitioners' great detriment lead us to reopen the question of jurisdiction, although we did not seek review of this question in this Court following the first decision.

In the *City of Indianapolis vs. Chase National Bank,* 314 U. S. 63, 62 S. Ct. 15 (See also 314 U. S. 714 and 62 S. Ct. 355) this Court held that the denial of a writ of certiorari, when a case was before the Court the first time, did not confer jurisdiction on the Federal District Court where there was not the requisite diversity of citizenship, and granted a writ of certiorari on the second petition and held that jurisdiction did not exist.

Nellie Ione Gray, Evlyn Levison, A. C. McLaughlin and nineteen (19) of the plaintiffs were all residents of the State of California. The complaint sought to impress a trust against the interest of oil and gas production reserved by Levison and Gray, and also against the interest of Phillips Petroleum Company, to the extent necessary to make up any difference in the amount of royalty to which plaintiffs below, petitioners herein, were entitled (Orig.-R. 4-16). The complaint, as drafted, presented no separable controversy. The rule announced in *Alabama Great Southern Railroad Company vs. Thompson,* 200 U.

S. 206, 26 S. Ct. 161, 50 L. Ed. 441, is applicable and controlling here. The Court said:

> "But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal *(Wilson v. Oswego Twp.,* 151 U. S. 56, 66, 38 L. Ed. 70, 75, 14 Sup. Ct. Rep. 259), and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bills, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal."

To the same effect is *Wecker vs. The National Enameling & Stamping Company,* 204 U. S. 176, 27 S. Ct. 184.

Many of the United States Supreme Court cases are reviewed in *Regis vs. United States Drug Company,* 180 Fed. 201, by Judge Lowell. We believe the cases demonstrate that there is no separable controversy involved, and, hence, no jurisdiction in the Federal Courts, under 28 U. S. C. 71, which was in effect when this case was removed to the District Court of the United States. The propriety of certiorari as a method of protecting Federal jurisdiction from unauthorized calls upon it is not controlled by the probable usefulness of the decision as a precedent and consequently the recent change in the removal statute is not important here.

V.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

FRANK DELANEY,
L. H. LARWILL,

Counsel for Petitioners.

APPENDIX A

ASSIGNMENT FROM OLDLAND GROUP TO A. C. McLAUGHLIN, DATED MARCH 15TH, 1926 (ORIG. R. 13-16) SIGNATURES AND ACKNOWLEDGMENT ARE OMITTED.

"This agreement, made and entered into this 15th day of March, 1926, by and between R. Oldland, Maggie Moog, Thomas W. Leonard, J. W. Rector, C. T. Carney, Ambrose Oldland, W. C. Montgomery, M. K. Parsons, O. J. Shideler, J. J. Banta, J. M. Neal and Heirs of J. J. Shideler, Deceased, parties of the First part, hereinafter designated 'Oldland Group', and A. C. McLaughlin, party of the second part, hereinafter designated 'Assignee',

"Witnesseth:

"That the said Oldland Group in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to them in hand paid, receipt whereof is hereby acknowledged, and in further consideration of the royalties hereinafter set forth to be paid by the Assignee, and of the covenants and agreements hereinafter contained, subject to the approval of the Secretary of the Interior, does assign, transfer, convey and set over unto the said Assignee, his heirs, administrators, executors and assigns, that certain Oil and Gas Prospecting Permit issued by the United States of America under date of February 5th, 1924, designated 'Glenwood Springs, Colorado, 023128, embracing land situate in the County of Rio Blanco, State of Colorado, more particularly described as follows, to-wit: W½ SW¼ Sec. 14; W½ NE¼, NW¼, E½ SE¼ Sec. 15; E½ NE¼ Sec. 16; E½ E½ Sec. 22; W½ W½ E½ Sec. 23; W½, W½ E½ Sec. 26; E½ E½ Sec. 27, T. 2 N., R. 102 W., 6th P. M., Colorado; containing 1760 acres.

"The said Oldland Group covenants and agrees that full compliance has been made with the provisions of Paragraph Two of said Permit, in that prior to June 30th, 1925, a substantial and adequate drilling outfit was installed on said permit area and actual drilling operations were commenced, and that at the date hereof said permit is a valid and subsisting permit on the records of the General

Land Office and that there are no liens or encumbrances of any kind or nature of record or otherwise against said permit or the lands embraced therein.

"The said Assignee covenants and agrees to carry on such drilling and operations on said permit area as to fulfill the terms and conditions of said permit within the period therein prescribed or any extensions thereof. Assignee, for the purpose of carrying on such drilling operations is hereby granted the right to use the Star Drilling Machine, Boiler and Tools of said Oldland Group, without cost or expense therefor to said Assignee.

"It is understood and agreed by the parties hereto that notwithstanding anything in this agreement to the contrary, Assignee shall have the right at any time to terminate this agreement and to discontinue all operations upon said property and to abandon such property and to deliver same back to the Oldland Group; provided that upon abandonment, Assignee shall quitclaim and re-assign to said Oldland Group all right, title and interest as acquired hereunder in and to said permit and shall pay said Oldland Group the sum of two Thousand Dollars ($2,000.00), if at the date of said re-assignment Assignee shall not have complied with the drilling requirements of said permit, and receipt of such sum of $2,000.00 by said Oldland Group shall be construed as full release of Assignee from any and all obligations hereunder.

"In event of discovery being made upon said permit area of oil and/or gas in quantities deemed by Assignee to be sufficient to pay to pump or to otherwise secure and save the same, then Assignee shall apply for leases embracing said permit area and Assignee shall have the right to designate the one-quarter of the permit area to be embraced in lease prescribing a flat Government royalty of 5%.

"That in event of leases being issued to Assignee embracing one-quarter and three-quarters of said permit area, Assignee shall pay out of production secured thereon royalties due the Government as in said leases prescribed and

shall pay to said Oldland Group a royalty of 7½% of the market value at the time produced of oil produced and served on said lease embracing one-quarter of the permit area in which a Government royalty of 5% is prescribed and shall pay to said Oldland Group a royalty of 4% of the market value of the oil produced and saved on said lease embracing three-quarters of the permit area in which a graduated Government royalty is prescribed. For all gas produced and saved and sold off the premises by Assignee, Assignee shall pay said Oldland Group 7½% of all moneys received from the sale of such gas.

"If casinghead gasoline is manufactured on the demised premises, or elsewhere by Assignee from gas produced from said demised premises, then Assignee shall pay to said Oldland Group 7½% of the proceeds from the sale of said gasoline, less the entire cost of gathering, manufacturing, handling and selling the same. It is agreed between the parties hereto that 70% of the gasoline extracted from the gas produced on the demised premises shall be considered as covering the entire cost of gathering, manufacturing, handling and selling said gasoline, and the remaining 30% shall be divided between the parties hereto, on the basis of 7½% to the said Oldland Group, and 92¼% to Assignee. Assignee shall have the right to contract for the manufacture of casinghead gasoline from gas produced on the said premises on the same basis hereinabove mentioned—that is, 70% to the party manufacturing said gasoline, and 30% to be divided between the parties hereto, on the basis of 7½% to Oldland Group and 92½% to Assignee.

"Payment hereunder by Assignee to said Oldland Group shall be made on the 20th day of each calendar month for all royalty substances produced and sold by Assignee during the next preceding calendar month. Payment by Assignee to said Oldland Group is to be made hereunder to First National Bank of Meeker, Colorado, for account of said Oldland Group, and payment to said Bank is to be full release therefor to Assignee, and Assignee shall

in no manner be responsible for the disbursement of said payment.

"This agreement shall inure to the benefit of and be binding upon the heirs, representatives, executors, administrators and assigns of the parties hereto.

"In Witness Whereof, the parties hereto have caused this agreement to be executed the day and year first hereinabove written."

APPENDIX B

EXCERPTS FROM OPINION, GRAY ET AL. VS. OLDLAND ET AL., 179 FED. (2D) 408.

"Federal law did not create this asserted cause of action, nor it is an essential element thereof in the sense that the cause of action will be sustained if federal law is given one construction or effect, and defeated if given another. The asserted rights of the parties arise out of a private contract, and they must stand or fall upon its construction or effect. * * * * * (Page 412)

* * * * "In the event the leases were issued to the assignee as provided by the permit and underlying legislation, McLaughlin agreed, in addition to the royalty due the Government, to pay to appellants 'a royalty of 7½ per cent of the market value at the time produced, of oil produced and saved on the said lease embracing one-fourth of the permit area in which a Government royalty of 5 per cent is prescribed, and shall pay to the Oldland Group a royalty of 4 per cent of the market value of the oil produced and saved on the said lease embracing three-fourths of the permit area in which a graduated Government royalty is prescribed.'

"Although he did not drill the wells contemplated, McLaughlin did keep the permits alive, always in the name of his assignors. When in 1938 he applied for an exchange lease under the 1935 Amendment, he acknowledged by affidavit the interest of the assignors in the permit and that such rights would be transferred to any lease granted. * * * (Page 413)

* * * * * * *

"But even though the subsequent legislation operated to entinguish the rights of the appellants as between them and the Government, it did not affect the rights of the parties under the private contract. As we have said, the rights of the parties here do not arise out of the federal act. They have their genesis in and derive their vitality from an agreement between the parties, which unless contrary to declared public policy, are enforceable in accordance with its terms and conditions and applicable law. • • • •

• • • • • •

"When McLaughlin applied for his exchange lease under the 1935 Amendment, *he acknowledged his obligation to pay the original permittee 4 per cent on all oil produced under the lease.*" (Italics are our own) (Page 415)

APPENDIX C

EXCERPTS FROM PETITION FOR REHEARING FILED BY RESPONDENT, AND OTHERS, ON THE FIRST APPEAL (ORIG. R. 630-631)

• • • "We may validly assume that, as to the lease on ¾ of the acreage, where the government royalty would have been 12½% and more (on a graduated scale upward), the resultant total royalties to the government and the Oldland Group would have been substantially the same, or exactly the same, as under the present lease. But that is not so as to the remaining one-quarter of the acreage where the royalty to the government would have been a flat 5%. As to that one-quarter of the acreage, the total royalty to the government and the Oldland Group would have been a flat 12½%. Under the present lease, and the decision rendered by this Court, that combined royalty is 21%, which total is made up of 4% payable to the Oldland Group and 17% payable to the government (as appears at pages 461, 485, of the record, 17% is the government rate where production varies from 90 to 110 barrels per day, as was the case here at the time of trial; see record, page 306). This means that, as to this one-quarter of the acreage,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 67.

AMBROSE OLDLAND, CARRIE KNOWLES, ERNEST OLDLAND, ET AL., *Petitioners,*

v.

PHILLIPS PETROLEUM COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Phillips Petroleum Company (hereinafter called "Phillips"), Respondent here, has filed its Petition for Writ of Ceriorari (No. 107) praying that this Court review the decision of the Court of Appeals in order to correct the portion thereof sustaining the trial court's allowance of interest. We here propose to show that the petition filed on behalf of Ambrose Oldland, et al. (hereinafter called "Plaintiffs"), does not state any proper basis for issuance of the writ.

STATEMENT.

This case was originally commenced by plaintiffs to recover an overriding royalty interest in Phillips' Levison oil and gas lease in the Rangely Field in Colorado, on the theory that a trust relationship resulted from an assignment agreement entered into March 15, 1926, assigning a prospecting permit which formerly covered the same lands. The case was removed to the federal court, and on trial judgment was entered for the defendants. Plaintiffs appealed and the Court of Appeals for the Tenth Circuit reversed the district court saying that:

> "* * * we hold that a trust relationship was created binding upon all parties in the chain of title; that such relationship was not extinguished by the 1935 or 1942 amendments, and that in equity and good conscience, the appellants are entitled to an overriding royalty of 4 per cent of the oil and 7½ per cent of the gas produced, saved and sold from the leasehold estate, free and clear of cost, subject only to the government royalty."

Oldland v. *Gray,* 179 F. 2d 408, 415. The defendants applied for a writ of certiorari, urging (among other things) that the Court of Appeals had in effect rewritten the contract under which plaintiffs claim, and in so doing exceeded its equitable powers. Plaintiffs filed briefs in opposition to the petition. Writ of certiorari was denied. *Gray, et al.,* v. *Oldland, et al.,* 339 U. S. 948, 70 S. Ct. 803, 94 L. Ed. 1362 (Cause 673, October Term, 1949).

The Court of Appeals then filed its mandate directing entry of judgment in accord with its decision. The trial court actually awarded judgment for 4 per cent of all oil and 7½ per cent of all gas produced from the lands covered by the lease, plus interest on the value of the proceeds of past production from date of sale at 6 per cent. Phillips then appealed to the Court of Appeals to correct the judgment. That court held on the second appeal that judgment should be for 4 per cent of the oil and 7½ per cent of the gas produced from the leasehold estate or "working

interest," i.e., those percentages of the amount remaining after deducting from total production the amount of government royalties. The allowance of interest was sustained, but Judge Bratton dissented on this point (see *Phillips Petroleum Company* v. *Oldland,* 187 F. 2d 780).

Reference is made to the Petition for Writ of Certiorari in Cause No. 673, October Term, 1949, and to the decisions of the Court of Appeals, Tenth Circuit, reported in 179 F. 2d 408 and 187 F. 2d 780 for a more complete statement of the case.

ARGUMENT.

1. Decision of the Court of Appeals on the Second Appeal Follows the Doctrine of the Law of the Case.

The principle requiring that the law of the case be followed would have been violated only if the Court of Appeals had in its second opinion departed from the decisions reached in its first opinion. It did not.

As above indicated the decision of the Court of Appeals on first appeal upon the merits of the controversy is reflected in the following portion of its opinion (179 F. 2d at 415):

> " * * * we hold that a trust relationship was created binding upon all parties in the chain of title; that such relationship was not extinguished by the 1935 or 1942 amendments, and that in equity and good conscience, the appellants are entitled to an overriding royalty of 4 per cent of the oil and 7½ per cent of the gas produced, saved and sold from the leasehold estate, free and clear of cost, subject only to the government royalty."

This language so patently describes an overriding royalty that is a percentage of the production accruing to the working interest after payment of government royalty that there is little room for interpretation. The term "overriding royalty" is a well understood term in the oil and gas industry. It is defined in *Knight* v. *Chicago Corp.,*

Phillips will be required to pay 8½% more royalty than would have been required originally under the 1926 assignment contract if dual leases had issued as contemplated by that contract. By the decision of the Court, and as to that same one-quarter of the acreage, the appellants suffer a reduction of only 3½% as compared with the 8½% increase suffered by Phillips." • • •

(Tex. Civ. App., 1944), 183 S. W. 2d 666, 670, affirmed 188 S. W. 2d 564, as follows:

> "An overriding royalty is a certain percentage of the working interest which, as between the lessee and assignee, is not charged with the cost of development or production."

In the case of *Wright* v. *Brush,* (C.C.A. 10, 1940) 115 F. 2d 265, at 267, in an opinion written by Judge Huxman it is stated that:

> "An 'overriding royalty' is generally defined as an interest carved out of the lessee's share of the oil also called the working interest, as distinguished from the owner's interest or royalty interest."

See also, *Thornburgh* v. *Cole,* (Okla., 1949) 207 P. 2d 1096, 1098.

Since the overriding royalty is always carved out of the leasehold estate or working interest, it is normally considered as being a fraction or percentage of that working interest or leasehold estate, but it may sometimes be stated as a fraction or percentage of the entire production. It is necessary, therefore, to specify in each instance whether the stated fraction or percentage is applicable to the entire production or only that portion of production creditable to the leasehold estate. This the court did in this instance, specifying that the stated percentages were of oil and gas "produced, saved and sold from the leasehold estate."

The term "leasehold estate" refers, of course, to the interest of the lessee under the oil and gas lease. *Whitt* v. *Kentucky Oil Producing Co.,* (C. A., 1928) 223 Ky. 348, 3 S. W. 2d 786, 789; *McDonald* v. *Sanders,* (Tex. Civ. App., 1947) 207 S. W. 2d 155.

The term "overriding royalty" connotes in itself an interest free of costs, and the "leasehold estate" is that interest remaining after payment of government royalty.[1]

[1] The government royalty is not, in this instance, a fixed percentage of production but a varying percentage based on the rate of production.

Apparently in an effort to make its decision definite and certain beyond any reasonable doubt, the Court of Appeals specified that the interest recovered was to be the stated percentages of the production creditable to the working interest "free and clear of cost, *subject only to the government royalty.*" The words "subject to" are equivalent to "charged with" or "after payment of" the government royalties. See Words and Phrases, Perm. Ed., Vol. 40, p. 387. Thus the stated percentages are twice indicated as being applicable to the production remaining after deducting government royalties. Interpretation of the language by plaintiffs would ignore or distort the ordinary meaning of the language used.

Plaintiffs have urged that the Court of Appeals must have granted judgment for the stated percentages of the entire production from the leased lands because the percentages stated in the 1926 agreement were intended as percentages of the entire production, but the Court of Appeals' opinion obviously was not intended as a strict enforcement of that contract. All of the parties recognized that the conditions prescribed in that agreement as a prerequisite to the payment of overriding royalty were not and could not be fulfilled. Phillips urged that in this situation the court was without power to grant relief. Plaintiffs, on the other hand, urged that in equity they were entitled to some relief and that where exact performance of a contract is not practicable plaintiffs nevertheless were entitled to approximate relief. The appeal court adopted the plaintiffs' view, commenting in its opinion upon the flexibility of the powers of equity and rendering judgment under its equitable powers for what it considered the plaintiffs were "in equity and good conscience entitled." The decision of the Court of Appeals on the second appeal explains this fully and carefully, saying in part (187 F. 2d at 781):

> "It was these considerations which prompted us, in the exercise of our equitable discretion, to decline lit-

eral enforcement of the permit assignment, but instead to award the claimants the substantial benefit of it by impressing a constructive trust on the proceeds of 4 per cent. of the oil and 7½ per cent. of the gas produced from all of the leases within the original permit area, after the deduction of the government royalty, regardless of the percentage—whether 12½ per cent. or more. In sum, we reasoned that while the Oldlands' rights were rooted in the contract, they were nourished and vitalized by the flexible processes of equitable jurisprudence, and ought therefore to find justification in the conscience of the chancellor."

The judge who wrote the decision on first appeal and those members of the court concurring therein should be the best judges of the purpose and intent of the language employed in the decision on first appeal, and their interpretation should not be disturbed in absence of some important and compelling reason for advancing a contrary interpretation. No such reason has been advanced. The Court of Appeals has obviously, therefore, not violated the principle requiring that the law of the case be followed.

2. The Decision of the Court of Appeals Does Not Conflict With the Decision in Emerson v. Little Six Oil Co., (C. C. A. 5, 1924) 3 F. 2d 265.

The Emerson case holds that under Texas jurisprudence an overriding royalty under a producing oil and gas lease will be considered an interest in real estate for so long as the lease remains in effect. Plaintiffs argue that the Court of Appeals' decision in this case is necessarily to the contrary because the amount of overriding royalty as therein fixed will depend upon the rate of production. Plaintiffs have not established, however, that the Texas rule would be applicable in Colorado. Even if the decision by the Court of Appeals below were contrary to that of the Court of Appeals for the Fifth Circuit, this would not afford a reason for granting a writ of certiorari since the conflict would be merely corollary to a permissible difference of

opinion in the state courts. *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, 82 L. ed. 1290. Furthermore plaintiffs do not establish the point that a variable overriding royalty interest could not be an interest in real estate. We are able to find no decisions supporting such a view. The material cited by plaintiffs at page 7 of their petition merely indicates a proper distinction between a royalty interest and a net profits interest. They do not support the view that there is any distinction in so classifying royalty interests between fixed and variable overriding royalties.

The question as to whether an overriding royalty under an oil and gas lease is an interest in real estate is not involved in the decision of the Court of Appeals which plaintiffs seek to have this Court review. There is no conflict between that decision and the decision in the Emerson case.

3. The Court's Interpretation of Its Former Opinion Involved No Unwarranted Exercise of Its Equitable Discretion.

Plaintiffs third reason for granting a writ of certiorari is based upon the unfounded assumption that the decision of the Court of Appeals on the second appeal conflicts with its decision on the first appeal in this case. Since there is no conflict (see point 1 above), the argument falls.

4. This Case Does Not Afford an Appropriate Opportunity for an "Authoritative Decision as to the Method of Computing Overriding Royalty."

Plaintiffs urge that the decision of the Court of Appeals be reviewed in order to furnish the oil industry an authoritative decision as to the manner of computing overriding royalty. Clearly the matter of how overriding royalty is to be computed in any given instance is an appropriate subject for agreement between the parties to the transaction involved, and any decision of this Court in

this case could not alter that situation. The Court of Appeals specified how the royalties should be computed in this case. A decision that the language used by the Court of Appeals to so specify must be given a meaning different from that intended by that court could accomplish naught save confusion. This is particularly true since there is no evidence that that court's language is not in accord with ordinary usage.

5. The Issue as to Federal Jurisdiction Offers No Basis for Issuance of Writ of Certiorari.

The issue of jurisdiction was briefed and argued on the first appeal of this case. The Court of Appeals held that the complaint presented a separable controversy as to Phillips and that the case was, therefore, properly removed. Pertinent language of the opinion is as follows (179 F. 2d 408, at 413):

> "But in addition to the joint relief sought against all of the appellees, the appellants by separate prayer, sought to impress a trust upon the production or its proceeds in the exclusive possession and control of Phillips, and to have Phillips declared to be the trustee of same. All of the appellees or their successors in title are alleged to have some royalty interests in the lease, but only Phillips owned the lease or controlled the interest sought to be charged with the trust. Only Phillips could be held accountable as trustee for the claimed interest of the appellants. As to that aspect of the suit, a separable controversy was presented between the appellants and Phillips, and removal of that controversy transferred the entire case to the federal court, to be judged in accordance with the substantive law of Colorado."

The decision of the Court of Appeals upon this point was not contested by either party nor was the issue raised on petition for certiorari to review that decision. No issue as to jurisdiction was raised in any other subsequent proceeding either in the trial court or on second appeal to the Court of Appeals.

Correctness of the decision of the Court of Appeals on this point is emphasized by the judgment entered which afforded the plaintiffs substantially the relief sought and required payment by Phillips of all sums recovered, no relief being granted against any other party defendant. There was clearly a separable controversy as between plaintiffs and Phillips, which could be (and now has been) fully adjudicated between them. No other party was necessary or indispensable to such adjudication. The case was, therefore, properly removed. *Preston* v. *Kaw Pipe Line Co.*, (C. C. A. 10, 1942) 128 F. 2d 162, certiorari denied, 317 U. S. 674, 63 S. Ct. 80, 87, L. Ed. 541; *State* v. *Neustadt*, (C. C. A. 10, 1945) 149 F. 2d 143; *Sewell* v. *J. E. Crosbie, Inc.*, (C. C. A. 8, 1942) 127 F. 2d 599, certiorari denied, 317 U. S. 643, 63 S. Ct. 36, 87 L. Ed. 518.

Even if there were some doubt as to removability of this cause, such doubt would not afford sufficient basis for granting a writ of certiorari. The new judicial code (28 U. S. C. A. § 1441) alters the rule applicable to removal of causes by reason of separable controversy, so that no useful precedent would be established upon review of this issue. No matter of public importance is involved since construction of rules already replaced would be of no assistance in administration of the present laws. This Court will exercise its jurisdiction to review judgments of the Court of Appeals on writ of certiorari only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. Ex parte Lau Ow Bew, 141 U. S. 583, 587, 12 S. Ct. 43, 35 L. Ed. 868.

CONCLUSION.

Since plaintiffs' petition for writ of certiorari discloses no adequate basis for issuing the writ, that petition should be denied.

Respectfully submitted,

RAYBURN L. FOSTER,
HARRY D. TURNER,
GEORGE L. SNEED,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No.

PHILLIPS PETROLEUM COMPANY, *Petitioner,*

v.

AMBROSE OLDLAND, CARRIE KNOWLES, ERNEST OLDLAND, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner is named as respondent in the petition, filed on behalf of Ambrose Oldland, et al., original plaintiffs in this cause, which was docketed May 22, 1951, as No. 749 of the October Term, 1950 (now No. 67, October Term, 1951). Phillips Petroleum Company, Petitioner, prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered March 10, 1951 (No. 4149, 187 F. 2d 780).

This Court has jurisdiction under 28 U. S. C., § 1254 (1), 62 Stat. 928.

On first appeal from the decision of the trial court denying any relief, judgment was reversed and the cause remanded with directions to enter judgment for plaintiffs for an overriding royalty on production from Phillips Petroleum Company's Levison Lease in the Rangely Field of Colorado (R. 2-4). It was implicit in the opinion and mandate issued by the Court of Appeals that plaintiffs were entitled to personal judgment in money for the value of oil already produced and sold from the lease, but nothing was said in the opinion or the mandate respecting interest on that amount (R. 2-4). No application was filed to enlarge the mandate. The trial court, over protest of Phillips Petroleum Company, entered judgment awarding interest (R. 16, 18). Phillips Petroleum Company appealed but the Court of Appeals upheld the granting of interest at six per cent (6%). Judge Bratton dissented as to this point (R. 33-39).

The question here presented is the one upon which the Court of Appeals divided, i. e.: Since the mandate of the Court of Appeals made no provision for interest did the trial court have authority to enlarge the judgment by adding interest thereto?

This Court should issue a Writ of Certiorari to review the decision of the Court of Appeals because the majority of that Court has not given proper effect to applicable decisions of this Court which hold that where a judgment is reversed with directions to the trial court to enter judgment for a specific amount with nothing being said about interest, it is the duty of the trial court to enter judgment strictly in accordance with the mandate and not to add the allowance of interest.

Neither expressly nor by implication did the Court of Appeals, in reversing the trial court and directing the entry of judgment for the plaintiffs, direct that the plaintiffs be awarded interest (R. 2-4). An inferior court has no power or authority to deviate from the mandate issued by an ap-

pellate court. It is clear that the interest permitted was in excess of the terms of the mandate and wrongly included in the judgment. The trial court was without power to depart from the mandate in that manner. This Court has so held: *In Re Washington & Georgetown Railroad Company,* 140 U. S. 91, 11 S. Ct. 673, 35 L. ed. 339, and in the more recent case of *Biggs* v. *Pennsylvania Railroad Company,* 334 U. S. 304, 68 S. Ct. 1039, 92 L. ed. 1403.

Respectfully submitted,

RAYBURN L. FOSTER,
HARRY D. TURNER,
GEORGE L. SNEED,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 107

PHILLIPS PETROLEUM COMPANY, Petitioner,

vs.

AMBROSE OLDLAND, CARRIE KNOWLES, ERNEST OLDLAND, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW

The opinion of the District Court is not reported but appears in the record (folios 17-18). The opinion of the United States Circuit Court of Appeals for the Tenth Circuit appears in 187 F. 2d 780. The opinion on the first appeal to the United States Circuit Court of Appeals for the Tenth Circuit appears in 179 F. 2d 408.

JURISDICTION

This Court has jurisdiction to review this case under 28 U. S. C. 1254 (1). It is urged that jurisdiction should not be exercised because the petiton for writ of certiorari

is not accompanied by the record of the lower court, and because the lower court properly allowed interest.

QUESTION PRESENTED

The only question presented on the petition of Phillips Petroleum is whether it was proper to award interest as a part of the judgment recovered by plaintiffs below, respondents here.

STATUTES AND RULES INVOLVED

The Statutes involved are 28 U. S. C. 1254 (1), 28 U. S. C. 2101 (c) and 28 U. S. C. 71 now superseded. Also Rule 38 (3) of the Supreme Court of the United States.

STATEMENT

This proceeding appears to be an independent petition for a writ of certiorari from this Court to review that part of the decision of the lower court which involves the question of interest and is not a cross petition in Cause No. 67, October Term, 1951, in this Court. (Cause No. 67 was docketed as No. 749 at the October, 1950, Term.)

It is not accompanied by the record below but depends for support upon the record filed in Cause No. 67.

Unless this Court sees fit to consider the petition as a cross petition in the other case, Cause No. 67, it is submitted that the petition should not be considered because it is not supported or accompanied by the record below. The petitioner did not apply for a rehearing in the Circuit Court of Appeals and the period of ninety days for it to file a record has elapsed. Regardless of the regularity of the proceedings in this Court, and whether the petition for writ of Certiorari filed by Phillips Petroleum Company should be regarded as a cross petition in Cause No. 67, the case should not be reviewed by this Court on the grounds sought and urged by petitioner Phillips Petroleum Company for the following reasons:

(a) The contention that the mandate of the United

States Circuit Court of Appeals for the Tenth Circuit, following the decision on the first appeal, made no provision for interest was not properly raised by the Phillips Petroleum Company or any other party in any of the proceedings which ended in the judgment reviewed by the Court of Appeals in the Second Appeal. Inasmuch as the question was not properly raised it should not be considered by this Court.

(b) Interest was properly allowed by the trial court even though no reference thereto was made in the mandate of the Circuit Court of Appeals following the decision on the first Appeal.

ARGUMENT

All references to the record herein made are to the record in Cause No. 67, October Term, 1951, of this Court.

The sole objection raised by petitioner, Phillips Petroleum Company (R. 9 and 10) to the proposed form of judgment and decree in so far as interest was concerned was that the obligation was unliquidated. The statement of points filed by petitioner, Phillips Petroleum Company (R. 31 and 32) in compliance with Rule 75 (d), Federal Rules of Civil Procedure, likewise raises only the point that the obligation was unliquidated. It is apparent therefore that the point that the trial court was without authority to award interest was never raised in the trial court.

Rule 16 of the Rules of the United States Circuit Court of Appeals for the Tenth Circuit provides *inter alia:*

> "The statement of points intended to be relied upon shall be printed by the clerk with the record. The court will consider only the points so stated and the parts of the record as designated."

In the case of *Western Nat. Ins. Co. v. LeClare,* 163 F. 2d 337, 9th C.C.A. the Court said on page 340:

> "These points were not stated in appellant's statement of points and hence need not be considered by us."

In the case of *Bennett v. Scofield,* 170 F. 2d 887, 5th C.C.A. the Court said on page 889:

> "Appellants did not designate the complete record to be sent up; nor did they designate as a point upon which they intended to rely, in accordance with Rule 75 (d), Federal Rules of Civil Procedure, 28 U.S.C.A., the failure of the trial court to admit in evidence certified copies of certain pleadings made in a State court of original jurisdiction and that court's judgment. We, therefore, may not consider appellant's contention that the trial court erred in failing to receive the pleadings and the judgment referred to. It is not properly before us."

In the case of *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452, 67 S. Ct. 401, Mr. Justice Black, in delivering the opinion of the Supreme Court, said on page 404:

> "The Circuit Court held that this question was not properly raised before it because respondent had failed on appeal to make 'a concise statement' of the point as required by Rule 75 (d) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723 c * * * * We cannot hold that the Circuit Court erred when it refused to consider the question because of respondent's failure to comply with Rule 75 (d)."

In the last mentioned case this Court said that the Circuit Court need not consider a question not properly raised. Conceding that an appellate court may have a discretionary power to raise questions not covered by the statement of points we urge that such power is never exercised where the question was not raised or considered in the trial court. Such practice would be manifestly unfair to the trial court.

It was proper to allow interest under general principles of law and equity. The petitioner's argument to the contrary is predicated on a long line of decisions which hold that if an appellate court remands a case with specific instructions to enter a definite form of judgment, one that ends all further litigation, no further discretion is vested in the trial court and the judgment must be entered in exact conformity to the mandate and opinion of the higher Court.

We do not dispute this principle of law, but we do say it is not applicable to the facts of this case because the United States Court of Appeals for the Tenth Circuit did not pass on the amount of money judgment to be entered by the trial court in its decision on the first appeal, nor did it pass upon the question of interest in any form and did not decide directly or by implication whether interest was or was not to be allowed. The question was left entirely open. That there must be a specific direction to enter a specific form of judgment appears from the following quotation from the case relied on by the petitioner, viz., *Ex Parte Washington G. R. Co.*, 140 U. S. 91, 11 S. Ct. 673:

> "The principle has been well established, in numerous cases, that, on a mandate from this Court, containing a specific direction to the inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate. Ex Parte Dubuque & P. R. Co., 1 Wall. 69; Durant v. Essex Co., 101 U. S. 555, 556."

In the consideration of questions relating to the application of the "law of the case," it is well to remember that the opinion and the mandate of an appellate court are to be construed together. The opinion is a part of the mandate. See

Smalley v. Addressograph-Multigraph Corporation, 168 Fed. Rep. 2d, page 585 at 586;

Gulf Refining Company of Louisiana v. United States, 269 U. S. 125 at 135, 46 Sup. Ct. Rep. 52 at page 53;

In re: *Sanford Fork & Tool Co., et al.*, 160 U. S. 247, 16 Sup. Ct. 291.

In the last mentioned case the Court, after stating the rule that when a case has once been decided by the Court on appeal and remanded to the lower Court, whatever was before the appellate court and disposed of by its decision is considered as finally settled, then continues with the following language:

"But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. Hinkley v. Morton, 103 U. S. 764; Mason v. Mining Co., 153 U. S. 361, 14 Sup. Ct. 847; Nashua & L. R. Corp. v. Boston & L. R. Corp., 5 U. S. App. 97, 2 C.C.A. 542 and 51 Fed. 929. The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate, and either upon an application for a write of mandamus or upon a new appeal it is for this court to construe its own mandate, and to act accordingly. Sibald v. U. S., 12 Pet. 488, 493; West v. Brashear, 14 Pet. 51; Supervisors v. Kennicott, 94 U. S. 498; Gaines v. Rugg, 148 U. S. 228, 238, 244, 12 Sup. Ct. 611.

"In the case now before us, it is important, in determining what was heard and decided by the circuit court in the first instance, and by this court upon the appeal, to bear in mind, the settled practice of courts of chancery, recognized and regulated by the rules established by this court for the circuit courts sitting in equity. Rev. St. Secs. 916-918."

The general rule is that the face of the judgment is the test of its finality, and by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final.

See

Gulf Refining Company of Louisiana, et al., v. U. S., 269 U. S. 125, 46 Sup. Ct. Rep. 52 at 53;

Haseltine v. Central National Bank of Springfield (No. 1), 183 U. S. 130, 22 Sup. Ct. Rep. 49.

An issue or question of fact not specifically covered by the mandate or the opinion and not passed upon is subject to reconsideration by the lower court. In support of this statement the following appears in the case of *Sprague v. Ticonic National Bank,* 307 U. S. 161 at page 168, 59 Sup. Ct. 777 at 780, 781:

"The general proposition which moved that Court —that it was bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid at rest—is indisputable. Compare Kansas City Southern Ry. v. Guardian Trust Co., 281 U. S. 1, 50 S. Ct. 194, 73 L. Ed. 659. But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore foreclosed by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See In re Sanford Fork & Tool Co., 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414; Ex parte Century Indemnity Co., 305 U. S. 354, 59 S. Ct. 239, 83 L. Ed 216."

The principles of law applicable here are stated as follows in the case of *Illinois Bell Telephone Company v. Slattery, et al.* (Seventh Circuit Court of Appeals), 98 Fed. 2d 930, in which the following appears at page 932:

"We think, undoubtedly, the solution of the question before us must be made to depend upon a determination as to whether the lower Court, in entering the decree of February 5, 1938, failed or refused to give effect to, or misconstrued the mandate of the Supreme Court. The law seems to be well settled that a lower Court is free to determine any matter left open by the mandate of the higher court. Our attention is called to a number of authorities which sustain this principle. The case of Mason v. Pewabic Mining Co., 153 U. S. 361, 14 S. Ct. 847, 38 L. Ed. 745, is pertinent to the situation. There, as here, a fund was created as a result of a mandate of the Supreme Court. It was there held that no question was involved in the original suit as to the disposition of the fund in controversy and that the lower Court was consequently free to consider the question because it was a new one and an appeal lay only to the Circuit Court of Appeals."

Every case on the subject cited by the petitioner where-

in, on reversal of a judgment, it was held that the lower Court had no authority to enter judgment on matters not specified in the mandate of the appellate Court involved instances where every issue was finally decided and the appellate Court was able to direct the entry of a money judgment or other specific judgment which would end all litigation. The rule does not apply where the decision of the appellate Court in effect decides how a fund is to be disbursed or the persons who are entitled to share therein, but the amount of the fund is not determined or computed in the decision.

In *Blair, et al., v. Durham* (C.C.A.) (Sixth Circuit), 139 Fed. Rep. 2d 260, the Court states at page 261 that all cases which hold that interest is not allowable on the judgments affirmed by the Circuit Court of Appeals are founded upon the provisions of 28 U.S.C. 878 (now U.S.C.A. 1912). In cases in which interest is denied on the affirmance by the Circuit Court of Appeals of a money judgment, said statute applies and those cases are to be distinguished from the facts in the present case.

The following appears in *Hartford Life Insurance Company v. Blincoe,* 255 U. S. 129 at 136, 41 Sup. Ct. Rep. 276 at 278:

> "Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to."

Since it appears that the Circuit Court of Appeals of the Tenth Circuit did not consider or pass upon the question of the amount of the money judgment to be recovered by plaintiffs or whether interest was to be included, the argument of counsel that, since interest was not referred to in the mandate, interest is not to be allowed, is untenable.

Under Colorado law the allowance of interest was not only proper but was required under the Statute which reads as follows:

> "Creditors shall be allowed to receive interest, when there is no agreement as to the rate thereof, at

the rate of six per cent per annum, for all moneys after they become due, on any bill, bond, promissory note or other instrument of writing. * * * * * * and on money received to the use of another and retained without the owner's consent, expressed or implied, from the receipt thereof; and on money taken or retained and fraudulently converted to the taker's use from the time of taking."

C.S.A. 1935 Sec. 2 Chap. 88.

To the same effect see:

Bankers Trust Co. v. International Trust Co., 108 Colo. 15, 112 Pac. 2d 656;

Gaskins v. Bonfils (Tenth Circuit Court of Appeals) 79 Fed. 2d 352.

CONCLUSION

For the foregoing reason it is respectfully submitted that the petition for writ of certiorari filed by the Phillips Petroleum Company to review the question of the allowance of interest should be denied.

Respectfully submitted,

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